92-923

No. 92-_____

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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

STEPHEN M. GALLAGHER and KEVIN MOUSER, individually and as representatives of all other individuals similarly situated,
Petitioners,

v.

INDIANA STATE ELECTION BOARD; ALAN MILLS, JOSEPH DONNELLY; and DONALD COX, in their official capacities as members of the INDIANA STATE ELECTION BOARD; MARION COUNTY ELECTION BOARD; MARION COUNTY BOARD OF VOTER REGISTRATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state electoral system which disfranchises thousands of properly registered voters who move within the state after the close of pre-election of registration a sufficiently severe restriction on voter eligibility to require justification by a compelling state interest?

2. Do those provisions of the Indiana Election Code which disqualify properly registered voters who move their residence across a county line within the state, within thirty days before an election, from voting for all offices and ballot propositions except President and Vice President, and which permit properly registered voters who move within a county during the same time period, or who have moved outside the United States at any time, to vote for all federal, state and local

offices, violate the Equal Protection Clause of the Fourteenth Amendment?

3. Do those provisions of the Indiana Election Code which require a properly registered voter who changes residence to a different electoral precinct within a county, within thirty days before an election, to obtain a special affidavit from the county voter registration office before the day of election as a condition to eligibility to vote for all offices or ballot propositions at that election, but permit the same voter to vote only for President and Vice President of the United States by signing a similar affidavit on election day at the voting precinct where the voter is registered, unreasonably burden the voter's fundamental right to vote without sufficient justification, in violation of the Equal Protection Clause of the Fourteenth Amendment?

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OPINIONS OF COURTS

The opinion of the Supreme Court of Indiana in this case, App. 1-30, is reported at 598 N.E.2d 510 (1992). The opinion of the Court of Appeals of Indiana, Second District, App. 63-82, is reported at 579 N.E.2d 649 (1991). The findings of fact, conclusions of law and decision of the Marion Superior Court Room 1, App. 31-62, is not reported.

GROUNDS FOR JURISDICTION OF THIS COURT

The decision and judgment of the Supreme Court of Indiana sought to be reviewed was entered August 28, 1992. No petition for rehearing was filed. This Court has jurisdiction to review the final judgment of the Supreme Court of Indiana, which decides the validity of statutes of Indiana challenged as repugnant to the United States

Constitution, pursuant to 28 U.S. Code §1257.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case arises under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as it applies to certain provisions of the Indiana Constitution and Indiana Election Code. The principal state constitutional and statutory provisions involved are Article 2, Section 2 of the Indiana Constitution, and Indiana Code §§3-7-4, 3-7-8-2 and 3-11-8-2.

In addition, certain other provisions of the Indiana Constitution and Indiana Election Code are necessary to an understanding of the context in which the issues in this case arise, in light of the relevant parts of Indiana

election procedures. Those provisions are Article 2, §14 of the Indiana Constitution, and the following provisions of the Indiana Election Code: Ind. Code §§3-5-2-40, 3-6-5-14, 3-7-3-1, 3-7-3-2, 3-7-3-5, 3-7-3-6, 3-7-7-9, 3-7-8-1, 3-7-8-15, 3-11-1.5-3, 3-11-1.5-4, 3-11-1.5-5, 3-11-3-17, 3-11-4-8, 3-11-4-9.

The full text of each of the foregoing statutes and constitutional provisions is contained in a separate appendix, pursuant to Rule 14.1(f). The text of each referenced Election Code section appears in numerical order at App. 83-106.

STATEMENT OF THE CASE

1. Indiana Election Laws Applicable to Voters.

The basic eligibility requirements for voters in Indiana are stated in

Article 2, Section 2 of the Indiana Constitution:

> "Every citizen of the United States, of the age of 18 years or more, who has been a resident of a precinct 30 days immediately preceding such election, shall be entitled to vote in that precinct."

In Indiana a "precinct" is a geographical area established solely for the purpose of conducting elections, defined in the Indiana Election Code as "a subdivision of a county or township established for election purposes." Ind. Code 3-5-2-40. The boundaries of a precinct are established by the county executive based on census blocks and, with minor exceptions, must be drawn to contain no more than 800 voters, without crossing the boundary of any governmental unit or legislative district. Ind. Code 3-11-1.5, sections 3, 4 and 5.

The Indiana Constitution authorizes the General Assembly to provide by law for the registration of qualified voters. Article 2, Section 14. The Indiana Election Code establishes registration periods for new registrations or transfers within a county, ending on the 29th day before the date of any primary, general or municipal election. Ind. Code 3-7-3-5. Registration records are organized by precinct, Ind. Code 3-7-3-1, and once registered in a precinct the voter is not required to register again for subsequent elections so long as the voter resides at the same address. Ind. Code 3-7-3-2. However, upon changing residence the voter must transfer the voter's registration to the new address during the period of registration. Ind. Code 3-7-8-1; 3-7-8-2. The County Board of Voter Registration or Clerk must

prepare a list of registered voters for each precinct in the county no later than ten days before an election, Ind. Code 3-7-7-9, and the County Election Board, which is responsible for the actual conduct of any election in Indiana, Ind. Code 3-6-5-14, prepares poll lists with the names and addresses of all registered voters by precinct, for use in the election. Ind. Code 3-11-3-17.

To be entitled to vote in any election, a voter must be properly registered in the precinct in which the voter resides. Ind. Code 3-7-3-6. Regardless of the precinct of registration, the voter may vote only in the precinct where the voter resides on the day of election, with certain specified exceptions. Ind. Code 3-11-8-2. Two of those exceptions are at issue in this case.

One exception, Ind. Code 3-7-4, applies only to voting at a general election for electors for President and Vice President of the United States. If the voter moved from an Indiana precinct in which the voter was properly registered, within 30 days before the election, and cannot meet the residency requirements of the voter's new home, the voter may vote at the former precinct in person or by absentee ballot, by signing a special affidavit showing the qualifying change of residence, either before election day at the office of the County Clerk or Board of Registration, or at the precinct of former residence on election day.

The second exception applies to voters who move to a different precinct within the same county within 30 days before an election, and permits those voters to vote at the precinct of former

residence, where the voter is properly registered, for all offices or propositions to be voted on at the election. A voter desiring to vote under this exception must sign a special affidavit requesting transfer of registration after the election, at the office of the Clerk or Board of Registration, no later than 4:00 p.m. on the Monday before election day, and furnish a copy of the affidavit to the proper precinct election board (or attach it to the voter's absentee ballot, if eligible to vote absentee). Ind. Code 3-7-8-2(c)-(e). This procedure is not available to a voter

who moved to a different county in Indiana.[1/]

A third exception, not directly referenced in Ind. Code 3-11-8-2, applies to voters permanently residing outside the United States who were qualified voters in an Indiana precinct before leaving the United States. Those voters are eligible to vote by absentee ballot for all offices and propositions on the ballot in the precinct where the

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1/ Notwithstanding the general requirement that a voter changing address must transfer registration to the new address, Ind. Code 3-7-8-1, if the voter's new address is within the same precinct, the voter may vote at that precinct without obtaining a pre-election transfer affidavit from the registration board, by writing the voter's correct address on the poll list at the precinct on election day. Ind. Code 3-7-8-15.

voter resided before moving overseas. Ind. Code 3-11-4-8, 3-11-4-9.[2/]

2. Plaintiffs and Their Classes.

Plaintiff Gallagher changed his residence from Marion County, where he was a properly registered voter, to adjacent Hendricks County in Indiana less than 30 days before the November, 1988 general election. Local election officials advised him that he was ineligible to vote in that election, except for presidential electors. Gallagher's complaint challenged his disfranchisement under both the state constitution and the equal protection clause of the Fourteenth Amendment. His motion for preliminary injunction was

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[2/] Federal law requires that states provide a procedure whereby overseas residents can vote for federal offices, but does not apply to state or local elections. 42 U.S. Code §§1973ff through 1973ff-6.

denied on November 4, 1988. After the election, Gallagher filed an amended complaint, on behalf of a class of voters similarly situated, requesting injunctive and declaratory relief, plus damages for denial of his right to vote for federal offices.

Plaintiff Mouser moved to a different precinct within Marion County within 30 days before the November, 1988 general election. After unsuccessfully attempting to contact election officials by telephone to inquire about procedures for voting, Mouser visited the Board of Registration office in person on the day before the election, and was told that it was too late for him to preserve his general voting eligibility at his

precinct of former residence.[3/] He completed an affidavit of change of residence for presidential voting only, and voted at his former precinct for President and Vice President but no other offices.

After the election Mouser moved to intervene as a plaintiff in this action, and submitted an intervening complaint challenging the application to him, and other similarly situated voters, of the intracounty transfer provisions of Ind. Code 3-7-8-2, under both the State Constitution and the Fourteenth Amendment equal protection clause. His motion to intervene was granted on February 21, 1989.

[3/] In 1988 Ind. Code 3-7-8-2(c) required that the request for transfer affidavit be submitted to the Board of Registration no later than the Friday before election. In 1991 the statute was amended to its present form.

The trial court certified the case as a class action under Indiana Trial Rule 23, and defined subclasses A and B as follows:

> "Subclass A [the Gallagher class] consists of all persons who are residents and registered voters in Indiana and who changed their residence within 30 days prior to an election from a precinct in one county to a precinct in a different county within Indiana.
>
> Subclass B [the Mouser class] consists of all persons who are residents and registered voters in Indiana and who changed their residence within 30 days prior to an election from one precinct to another precinct within the same county in Indiana, and who fail or are unable to comply with the requirements of IC 3-7-8-2 as a condition to eligibility to vote in the precinct from which they moved."

Undisputed evidence at trial, based on official census reports and expert testimony, established that approximately 35,000 Indiana registered voters would move from their precinct of residence within 30 days before any

election, and therefore would potentially be within the scope of subclasses A and P as defined by the court. More than 25,000 registered voters would be likely to have moved within their county of residence, and approximately 8,900 registered voters would be likely to have moved from one county to another in Indiana, within 30 days preceding an election. Moreover, population trends evidence increasing mobility. Nevertheless, in 1988 only 4.3 percent of the estimated number of affected registered voters in Marion County preserved their voting rights in that election by complying with the procedures required under Ind. Code 3-7-8-2.

3. Decisions of the State Courts.

The Marion Superior Court entered its Findings of Fact, Conclusions of Law and Judgment on April 6, 1990. The

court, after reviewing the history of Article 2, Section 2 of the State Constitution and concluding that it requires a qualified voter to be a resident of the precinct in which the voter offers to vote for a continuous period of thirty days immediately preceding an election, concluded that this precinct residency requirement does not violate the United States Constitution, relying on Dunn v. Plumstein, 405 U.S. 330 (1972). App. 59-60. The trial court did not address the equal protection issues argued by plaintiffs based on the differing voter eligibility rules among voters moving within a county, voters moving between counties in Indiana, and voters who have moved overseas.

The Indiana Court of Appeals affirmed the trial court's interpretation of the State

Constitution, and then addressed the equal protection issues argued by plaintiffs. Turning first to the proper standard of review under the equal protection clause, the Court of Appeals held the standard to be applied in this case was "strict scrutiny" because "the right to vote has long been accorded the status of a fundamental right," citing Dunn v. Blumstein, 405 U.S. 330, 336 (1972). App. 77. The court concluded that the state had failed to offer a compelling state interest for the distinction between the voting rights of the Callagher and Mouser subclasses, and therefore the distinction could not survive "strict equal protection scrutiny." App. 78. The court went on to hold that even if "low-level equal protection scrutiny," under which the statute "needs only to be rationally related to a legitimate state interest,"

were the applicable standard, the statutory scheme failed the equal protection test. Because transfer requests could be acted on only after an election, the proffered justification of "administrative convenience" "bears no rational relationship to the distinction in voting rights between voters who move intra-county and make a timely transfer request and either of the subclasses Gallagher and Mouser represent. Further, we cannot conceive any legitimate state interest that would justify such a distinction." App. 80. Concluding that the statutory scheme limiting the rights of moving voters to voting only for President and Vice President is unconstitutional under the equal protection clause, the Court of Appeals reversed and remanded the judgment of the trial court. App. 81.

The Indiana Supreme Court granted transfer and affirmed the trial court. Agreeing with the lower courts' interpretation of the state constitutional provisions on voter qualifications, App. 10-18, the Supreme Court concluded that the use of the strict scrutiny equal protection test "in this context was error" because the plaintiffs "do not . . . enjoy a fundamental right to vote in a precinct in which they do not reside." App. 20-21. The court therefore analyzed the issues under the traditional "rational basis" equal protection test applied by this Court in Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978).

Regarding the Gallagher class of intra-county movers, the Supreme Court found a rational basis for the difference in voting eligibility between intercounty and intracounty movers,

concluding that the legislature "could have reasonably assumed" that a move within the same county was "less likely to result in a voter changing congressional or legislative districts and would be less likely to diminish the voter's legitimate interest in the local election", App. 23, notwithstanding the fact that members of the Gallagher class have not moved from the state and are disqualified from voting for statewide, federal and state offices as well as any state issues which may be on the ballot. The court's approval of this result is premised on the conclusion that the Gallagher class members retained no fundamental right to vote in state elections because they "cannot meet the 30-day [precinct] durational residency requirement." App. 25.

Reasoning that disqualification of the Mouser class was caused by "failure

to take timely steps to fulfill [the statute's] minimal requirements" to obtain a transfer affidavit from the voter registration office before election day, the court concluded that the statutory requirement "easily passes the rational basis test." App. 29. The court did not mention the fact that the Election Code permits moving voters to complete transfer affidavits at the polling places of their former precincts on election day and to vote in that election for President and Vice President (as Mouser did in 1988), or the fact that those transfer affidavits are delivered to the central county election offices where they can be processed after the election (as the Court of Appeals had noted). The Supreme Court justified the unique Indiana procedure on the grounds that "common sense dictates that

administrative convenience is served by a system requiring transfer affidavits to be executed in the office where the voting registration records are kept" and that "the statutory scheme at issue might help ensure that voters who move after the registration deadline actually inform the election office so a transfer of registration can be effected." App. 29-30.

The court therefore concluded that the statutes involved in this case, which effectively disfranchise all inter-county movers and most intra-county movers, consisting of a significant number of otherwise qualified Indiana voters, "do not violate equal protection guarantees." App. 30.

4. Federal Constitutional Issues Presented in State Courts.

In his second amended complaint filed December 1, 1988, Gallagher brought suit under 42 U.S.C. §1983 against the state and county election officials, alleging the rights of the members of his class to equal protection of the law under the Fourteenth Amendment were violated by the provisions of the Indiana Election Code which permit intracounty movers to vote in their precinct of former residence for federal and statewide candidates and statewide ballot propositions, but deny the same right to intercounty movers (Count III, App. 108-109). Gallagher requested declaratory and injunctive relief as to the statutory provisions which disfranchise the members of his class. App. 110-111.

In his amended intervening complaint submitted February 7, 1989, Mouser also sued under 42 U.S.C. §1983 and alleged that the provisions of the Election Code which require him and the members of his class to have executed a transfer affidavit at least four days before the date of the election at the office of the county clerk or board of registration, and deny voting rights to those intracounty movers who were unable to satisfy that requirement, violated the rights of the class members to equal protection guaranteed by the Fourteenth Amendment (Count III, App. 114-115). Mouser also requested declaratory and injunctive relief with respect to the requirements of Ind. Code 3-7-8-2, requesting that they be allowed to vote in all elections upon compliance with the procedure specified under IC 3-7-4

relating to presidential elections. App. 116-118.

When the trial court did not address these issues upon concluding that the voting rights of both subclasses could properly be denied under the ruling in Dunn v. Blumstein, both the Gallagher and Mouser subclasses argued on appeal that those provisions of the Indiana Election Code which effectively prevented them from voting, except for presidential electors, violated their constitutionally guaranteed right to equal protection of the laws (Brief Part II, argument headings at App. 119-120). The Court of Appeals addressed those issues, holding the statutes in question violative of the equal protection clause. On petition to transfer to the Indiana Supreme Court, the state election officials argued that the Court of Appeals erroneously decided the

issues under the equal protection clause (Part I of Brief, argument headings at App. 121), and the Supreme Court passed on those issues with respect to both the Gallagher and Mouser subclasses in affirming the trial court.

REASONS FOR GRANTING THE WRIT

1. The Indiana Supreme Court's Application of the Rational Basis Standard of Review to Disfranchisement of Properly Registered Voters of the Relevant Political Unit Conflicts with Controlling Precedents of This Court.

In its most recent voting rights decision, this Court stated:

> "The appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in [Anderson v. Celebrezze, 460 U.S. 780 (1983)]."
>
> Burdick v. Takushi, 504 U.S. ____, ____, 119 L.Ed.2d 245, 256 (1992).

Weighing Hawaii's ban on write-in voting against the ease of compliance with the

State's ballot access alternatives, this Court upheld the restriction as imposing "only a limited burden on voters' rights to make free choices and to associate politically through the vote", Id., and concluded that the "legitimate interests asserted by the State are sufficient to outweigh the limited burden that the write-in voting ban imposes upon Hawaii's voters." Id. at 257-258.

Earlier in the same term this Court also applied the Anderson balancing standard to strike down an Illinois law requiring a county candidate of a new political party to obtain 25,000 signatures in each electoral district, as compared to the same total signature requirement for a candidate in a statewide election, stating:

> "To the degree that a State would thwart [the interest of likeminded voters to gather in pursuit of common political ends] by limiting the access of new parties to the ballot, we

> have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, see Anderson, supra, at 789, and we have accordingly required any severe restriction to be narrowly drawn to advance a State interest of compelling importance."

Norman v. Reed, 502 U.S. _____, _____ 116 L.Ed.2d 711, 723 (1992).

In Anderson v. Celebrezze, speaking to the "analytical process" a court must use in evaluating constitutional challenges to specific provisions of a state's election laws, this Court articulated the following standard:

> "It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to

> burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional."
>
> Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

In Anderson the result of this analysis was invalidation of a March filing deadline for ballot access applied to an independent candidate for President. The same standard was used in Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 214 (1986), to strike down a state law preventing a political party from permitting independent voters to participate in certain party primaries.

In deciding this case the Indiana Supreme Court did not follow the analysis employed in Anderson, Tashjian, Norman and Burdick. Instead, it relied on Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 74 (1978) and

Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 732 (1973), for the proposition that "the appropriate inquiry is whether 'any stated facts reasonably may be conceived to justify' the distinction in voting rights at issue in this case." App. 21.

The Indiana Court of Appeals, which did not have the opportunity to consider this Court's decisions in Norman and Burdick, expressly rejected the State's argument that this Court's decision in Holt Civic Club "requires application of low-level equal protection scrutiny in this case" and held that "the proper standard is strict scrutiny" based on Dunn v. Blumstein, 405 U.S. 330 (1972), App. 76-77. Application of that standard resulted in the court's holding that the statutes disfranchising late moving voters "are unconstitutional

under the Equal Protection Clause." App. 81.[4/]

The so-called strict scrutiny equal protection test applied in Dunn to state durational residency requirements for voter eligibility was first fully articulated in Kramer v. Union Free School District No. 15, 395 U.S. 621, 626-628 (1969), which invalidated the limitation of a school district electorate to residents of the district who owned or leased real property there or had children enrolled in the schools. Previous voter eligibility cases which in effect applied the same strict standard, without discussion of its

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[4/] Alternatively, the Court of Appeals concluded that the challenged provisions failed "even if low-level equal protection analysis was appropriate in this case." App. 78.

variance from the more traditional equal protection test, include Carrington v. Rash, 380 U.S. 89 (1965) (ineligibility of military personnel to qualify as resident voters) and Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (poll tax payment requirement for voting eligibility in state elections).

After Kramer strict scrutiny was also applied to invalidate voter eligibility restrictions in Cipriano v. City of Houma, 395 U.S. 701 (1969) (revenue bond elections restricted to property taxpayers), Evans v. Cornman, 398 U.S. 419 (1970) (residents of federal enclaves in state could not vote in state elections), City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (general obligation bond elections limited to real property taxpayers) and Hill v. Stone, 421 U.S. 289 (1975) (property required to be listed for

taxation as condition to voting eligibility in city bond elections). The same test was applied to invalidate certain ballot access restrictions, e.g., Bullock v. Carter, 405 U.S. 134 (1972) (substantial filing fee requirements for primary), Moore v. Ogilvie, 394 U.S. 814 (1969) (formula for distribution of petition signatures among counties regardless of size), Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (signature requirement for independent candidate or new party more burdensome for city mayoral election than for statewide election). Heightened scrutiny was also applied in American Party of Texas v. White, 415 U.S. 767 (1974) (upholding ballot qualification requirements for new parties and independent candidates, in relation to percentage of votes received

in last election, and exclusion of minor parties from public financing of primaries).

In addition to Holt Civic Club and Salyer, decisions which expressly employed the deferential rational basis test include McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802 (1969) (unavailability of absentee ballots to pretrial detainees absent proof that other methods of voting were not provided), Rosario v. Rockefeller, 410 U.S. 752 (1973) (pre-primary cutoff deadline for enrollment in party) and Ball v. James, 451 U.S. 355 (1981) (limitation to land owners of right to vote for directors of water reclamation district). In each of those cases the Court sustained the challenged restrictions.

A few cases prior to Anderson invalidated state election law

restrictions without discussing the applicable standard of review, e.g., Lubin v. Panish, 415 U.S. 709 (1974) (requirement that indigent candidate pay filing fees for ballot access).

This Court has never decided a case challenging denial of voting rights to bona fide residents of an electoral unit, solely because of a change of residence within the unit after the registration cutoff date. The relevant facts appear more analogous to Kramer and Evans than to Holt, thereby pointing toward strict scrutiny as the applicable equal protection test. For Holt to control one must accept the proposition that an Indiana precinct is the relevant unit of government for determining the voter's eligibility based on residence. However, Indiana law makes clear that precincts are neither governmental units nor electoral districts, since they

elect no public officials and have no governmental functions; they are simply administrative units established for the convenience of administering elections.

Clearly this case is not simply an application of the rule permitting reasonable pre-election registration cutoffs approved in Dunn and its progeny, Marston v. Lewis, 410 U.S. 679 (1973) and Burns v. Fortson, 410 U.S. 686 (1973). Both the Gallagher and Mouser classes, by definition, have met Indiana's residency and registration requirements for the electoral districts in which they seek to vote. They do not challenge Indiana's 30-day durational residency requirement for purposes of eligibility to register at a new address under Ind. Code 3-7-3-5, but only the State's prohibition on their moving within the state after the registration cutoff date on penalty of losing their

right to vote for members of Congress and for state and local officials, at the polling places where their names properly appear on the voter rolls.[5/]

This Court should grant certiorari to resolve the conflict between the courts below concerning the proper standard of review to be utilized in evaluating plaintiff's equal protection challenges to the Indiana statutes disfranchising or placing onerous burdens on voters who change residence to a different precinct within the state after close of registration and who seek to vote at their precincts of registration, and to determine whether

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[5/] The plaintiff in Dunn did not meet the in-state durational residency requirement. Tennessee law provides, as it did at the time of the Dunn decision, that a voter moving within the state less than 90 days before an election may vote in the precinct where registered. Tenn. Code Ann. §2-7-115(a); Dunn, 405 U.S. at 333 n. 2.

failure of the state to preserve the voting eligibility of these classes of voters severely burdens, without a sufficiently justifiable state interest, the right of these classes of voters to vote.

2. The Eligibility Requirements for Intra-County Movers Fails the Most Deferential Rational Basis Test Utilized by This Court in Voting Rights Cases.

Even if, as the Indiana Supreme Court concluded, the pre-election affidavit requirement applied to the Mouser subclass as a condition to voting eligibility does not theoretically deprive those voters of their vote (although 96% of those potentially eligible were in practice disfranchised by this condition in 1988), the State's restriction must still satisfy the deferential rational relationship standard to satisfy an equal protection challenge.

The court's speculation that this requirement serves the administrative convenience of the voter registration officials is conclusively contradicted by the record. The state presented no evidence suggesting this requirement assists the administration of elections. Indeed, Marion County election officials testified that the requirement actually disserves their convenience in light of their other pre-election duties. And since intra-county movers who fail to obtain the pre-election affidavit from the Registration Board may complete a similar affidavit at the precinct for the presidential election, and those affidavits are turned in to the central election office after election for appropriate registration changes, the lower court failed to give any rationale for the greater requirement imposed on

voters desiring to vote for offices other than President.

Where no rational basis for a given classification appears, this Court has not hesitated to invalidate it as a violation of the equal protection clause of the Fourteenth Amendment. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (no record support for special permit requirement for group home for the mentally retarded as compared to other similar uses). In election cases this Court also has stricken irrational requirements which effectively disfranchise voters without applying heightened scrutiny, where no reasonable explanation was apparent. One example is O'Brien v. Skinner, 414 U.S. 524 (1974), where the Court invalidated New York's failure to provide absentee registration and voting procedures for eligible pretrial

detainees confined in the county of their legal residence, while permitting those procedures for any eligible voters, including pretrial detainees, unavoidably absent from their county of residence.[6/] In Illinois State Board of Elections v. Socialist Workers Party, Justice Rehnquist, who did not subscribe to the Court's use of strict scrutiny in this type of case, concluded that the statutory disparate treatment of signature requirements for statewide and Chicago candidates "bears no rational relationship to any state interest." 440 U.S. at 191. Likewise, in Cipriano two Justices concurred in striking the revenue bond voting eligibility limitations under the rational basis

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[6/] Although three Justices would have applied the compelling state interest test to this classification, the majority found it unnecessary to do so.

standard as involving "a voting classification wholly irrelevant to achievement of the State's objective", 395 U.S. at 707.

The fact that Indiana's requirement of completion of a pre-election affidavit obtained from a central office is unique among the 50 states argues persuasively that the state is unable to show any rational basis for the requirement.[7/] This Court has on more than one occasion noted the absence of the challenged restriction in most

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[7/] A survey of state laws relating to transient voters showed that all but six of the 47 states having a pre-election durational residence requirement greater than three days provide for retention of voting eligibility at the voter's former residence, and one state allows the voter to vote at the new location (32 states include inter-county movers). None, except Indiana, requires a pre-election special affidavit. Appendix to Appellants' Brief in Indiana Court of Appeals.

states as demonstrating a lack of sufficient justification for the requirement, e.g., Harman v. Forssenius, 380 U.S. 528, 543 (1965) (pre-election certificate of residence filed with city or county treasurer), City of Phoenix v. Kolodziejski, 399 U.S. 204, 212-213 (1970) (only 14 states restricted to property owners franchise on general obligation bonds).

This Court should grant certiorari to review whether Indiana's unique requirement of a pre-election transfer affidavit for intra-county movers, which is not used until after the election, lacks a sufficient rational basis to pass muster under the equal protection clause as a procedure which effectively disfranchises most voters to which it applies.

3. The Indiana Supreme Court's Decision That Disfranchisement of Late Moving Voters Does Not Violate the Equal Protection Clause Conflicts Directly with a Decision on the Same Issue by the New Jersey Appellate Court.

Neither the Indiana Supreme Court nor the Indiana Court of Appeals cited or discussed Afran v. County of Somerset, 244 N.J.Super. 229, 581 A.2d 1359 (1990), although the case was cited to both courts and discussed extensively in plaintiffs' briefs. The Afran court held that a construction of state law denying the franchise to a registered voter who moved to another county within the state, within the 30 day period before election when the registration books were closed, would place the state law "on a collision course with the United States Constitution" as interpreted by this Court in Dunn. 581 A.2d at 1363. Noting the distinction between a uniformly applied bona fide

residence requirement and a durational residence requirement, the Afran court concluded:

> "We have no doubt that the 30-day durational requirement for bona fide state residents readily meets the requisite stringent standard ... We do not, however, perceive any similar compelling State interest justifying an additional, new, and independent 30-day county resident requirement for a state resident who simply moves to a different county from the one in which he is already residing, in which he has permanently registered, and in whose election books he already has his page ... Nor have defendants been able to suggest to us any compelling state interest justifying the disparity between an intra-county mover and an inter-county mover either in terms of the mechanics of conducting the election or in generally protecting the integrity of the election process." Id.

Since the court in Afran found the election mechanism could not feasibly be adapted to limit the right to vote of both intra-county and inter-county

movers to candidates and questions common to their old and new election districts, the court concluded that both categories of voters had to be permitted to vote in the ensuing election at their precinct of registration, as state law already permitted in the case of intra-county movers.

This same issue had been presented to the Ninth Circuit in Barilla v. Ervin, 886 F.2d 1514 (9th Cir. 1989), but the issue was mooted as to future elections when Oregon enacted a law allowing all persons moving within 40 days prior to an election to vote without having to reregister. 886 F.2d at 1519, 1521. No other reported decision in either state or federal courts has been found which addresses this precise issue.

4. Denial of Voting Rights to the Many Thousands of Voters in Indiana and Other States Which Have No Adequate Provision to Preserve Voting Fligibility for Registered Voters Who Move Within the State After the Pre-election Cutoff Date Is an Important and Substantial Issue Arising Under the Equal Protection Clause on Which This Court Should Provide Guidance.

The undisputed evidence in this case, based on official census reports and expert testimony, established that approximately 35,900 Indiana registered voters move from their precinct of residence within 30 days before any election, and therefore would potentially be within the scope of Subclasses A and B. More than 25,000 registered voters would be likely to have moved within their county of residence, and approximately 8,900 registered voters would be likely to have moved from one county to another in Indiana, within 30 days preceding an

election. Moreover, population trends evidence increasing mobility.

It appears that between six and twelve states disfranchise registered voters who move within the state shortly before an election. See Record, Brief and Appendix of Appellants in Indiana Court of Appeals, Appendix A, and Record 589-591 (expert witness Henderson testimony regarding voting registration and election procedures in the laws of other states). While there is no record evidence concerning how many registered voters are disfranchised by these laws in other states, the number must reach in the hundreds of thousands given the 35,000 figure for Indiana. The effect of these laws is thus substantial, and justifies this Court's intervention and protection of the right to vote of this large group of disfranchised voters.

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Respectfully submitted,

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